Supreme Court, U.S.
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No. 94-21 JUL 1 1994

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In The

Supreme Court of the United States

October Term, 1994

DAVID DUKE, *et al.*,

Petitioners,

vs.

JIM SMITH, Secretary of the State of Florida, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does *Farrar v. Hobby,* 113 S. Ct. 566 (1992), preclude a 42 U.S.C. § 1988 attorneys' fee award to plaintiffs who were erroneously denied ballot-access injunctive relief by the district court, and whose post-election "capable of repetition yet evading review" appeal resulted in reversal, a declaratory judgment that a state statute is unconstitutional, and a finding that a candidate's First Amendment rights were violated?

2. Does the "capable of repetition yet evading review" exception to mootness provide an exception to the requirement that a party "directly benefit" from a judgment in order to be a "prevailing party" under 42 U.S.C. § 1988?

3. Does *Texas State Teachers Ass'n v. Garland Ind. School Dist.,* 489 U.S. 782 (1989), require an award of attorneys' fees to plaintiffs who have prevailed on significant issues and who have changed the behavior of the defendants as a result of a decision of a Court of Appeals?

LIST OF PARTIES

The parties to the proceedings are:

Petitioners:

DAVID DUKE, PATRICK J. MAHONEY, LARRY AGRAN, LYNDON H. LAROUCHE, JR., GUILLERMO SANCHEZ, TASHARAY S. OTWAY-SMITHERS, DAVID BALDWIN, EDWARD J. ROSENFELD, EUGENE COTTRELL, WILLIAM E. BONNELL and SUSAN B. THOMAS.

Respondents:

JIM SMITH, Secretary of the State of Florida, T.K. WETHERELL, Speaker of the Florida House of Representatives, GWEN MARGOLIS, President of the Florida Senate, JAMES M. LOMBARD, Minority Leader of the Florida House of Representatives, ANDER CRENSHAW, Minority Leader of the Florida Senate, SIMON FERRO, Chairman of the Florida Democratic Party, and VAN POOLE, Chairman of the Florida Republican Party, in their capacities as members of the Presidential Candidate Selection Committee.

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OPINIONS BELOW

The decision and final judgment of the United States District Court for the Southern District of Florida, denying Petitioners' requests for declaratory and injunctive relief, is reported. *Duke v. Smith,* 784 F. Supp. 865 (S.D. Fla. 1992). (App. D, 24a-39a). The decision of the Eleventh Circuit Court of Appeals, reversing the trial court and declaring a portion of Florida's statutory procedure for placement on the Presidential Preference Primary ballot, § 103.101(2)(c), Florida Statutes, unconstitutional, is reported. *Duke v. Smith,* 13 F.3d 388 (11th Cir. 1994). (App. C, 8a-23a).

The Order sought to be reviewed, in which the Eleventh Circuit denied Petitioners' Motion for Attorney's Fees under 42 U.S.C. § 1988, is unreported. (App. A, 1a-4a).

STATEMENT OF JURISDICTION

This Court's jurisdiction to review a post-judgment Order of the United States Court of Appeals for the Eleventh Circuit, denying Petitioners' Motion for Attorneys' Fees under 42 U.S.C. § 1988, is invoked pursuant to 28 U.S.C. § 1254(1).

Petitioners brought this case in the United States District Court for the Southern District of Florida, pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 2201, 2202, 1331 and 1343. A final judgment in Respondents' favor was entered by the District Court on January 30, 1992, and Petitioners filed a timely notice of appeal to the Eleventh Circuit Court of Appeals on January 31, 1992. Title 28 U.S.C. § 1291 provided federal appellate jurisdiction over the final judgment of the district court.

The Court of Appeals noted that although the 1992 Florida Presidential Preference Primary election was over, the statutory time-frame precluded complete judicial review of an adverse

ballot-access decision prior to a Presidential Primary election, and thus the case remained justiciable under the "capable of repetition yet evading review" doctrine. 13 F.3d at 392 n. 7; App. C, 13a-14a n. 7. The Eleventh Circuit reversed the district court's decision on February 3, 1994, finding a portion of the challenged ballot access statute to be unconstitutional, and noting that Petitioner Duke's First Amendment rights had been violated. *Id.* at 395 n. 15; App. C, 22a n.15.

Petitioners filed a timely Motion for Attorneys' Fees in the Court of Appeals, pursuant to Title 42 U.S.C. § 1988. The motion was denied on April 6, 1994. (App. A, 4a). This Petition for Writ of Certiorari is timely filed within 90 days of April 6, 1994, by July 5, 1994.

STATUTES INVOLVED

42 U.S.C. § 1988, provides in pertinent part:

> In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

§ 103.101, Fla. Stat., Presidential preference primary:

Reproduced in Appendix E at 40a-42a.

STATEMENT OF THE CASE

A. Procedural History

Petitioners were Republican and Democratic presidential candidates (and registered voters who wished to vote for those

candidates) who were excluded by Respondents from the 1992 Florida Presidential Preference Primary election ballot for the March 10, 1992 election. After the Petitioner-candidates' procedurally proper requests for reconsideration had been denied by Respondents on January 16, 1992, Petitioners sued the seven members of the statutorily-created Florida Presidential Candidate Selection Committee, seeking declaratory and emergency injunctive relief. Specifically, Petitioners sought to have the candidates' names placed on the ballot, and challenged the constitutionality of Florida's statutory procedure for ballot access. The challenged statute was Florida Statutes, § 103.101, which creates the exclusive mechanism for placing names on the Presidential Preference Primary election ballot. Petitioner David Duke also claimed that his exclusion from the ballot was based on his political views, in violation of the First Amendment.

Relief was denied after a preliminary injunction hearing which was consolidated with the trial on the merits pursuant to Rule 65(2), Fed. R. Civ. P. The district court found that the Committee's decision did not constitute "state action" as required for relief under 42 U.S.C. § 1983. (App. D, 35a-36a). Petitioners appealed to the Court of Appeals for the Eleventh Circuit.

Petitioners' demand for 1992 ballot access was soon moot, since the ballots were printed and the election occurred shortly after the trial. The case was deemed justiciable by the Eleventh Circuit under the "capable of repetition yet evading review" exception to mootness. (App. C, 14a).

The Eleventh Circuit reversed. The court found that the Committee's reconsideration decisions did constitute state action, declared § 103.101(2)(c) unconstitutional, and held that candidate David Duke's First Amendment rights had been violated by Respondents. (App. C, 15a, 19a, 22a). The court taxed costs in favor of the Petitioners as prevailing parties. (App. B, 5a-7a).

Despite its reversal of the district court's final judgment in Respondent's favor, the Court of Appeals denied Petitioners' Motion for Attorneys' Fees, holding that under *Farrar v. Hobby,* 113 S. Ct. 566 (1992), Petitioners were not "prevailing parties," because "[t]hese appellants did not directly benefit from the relief they achieved in *Duke v. Smith.*" (App. A, 2a-3a).

The appellate court acknowledged that "[t]he behavior of the appellees will change as a result of our ruling . . .," (App. A, 3a), but considered that to be insufficient to confer "prevailing party" status:

> Nothing in the decision which the appellants obtained from this Court obliges Florida to adopt a new reconsideration procedure of any type in place of the unconstitutional procedure that we struck down.
>
> Thus, the appellants' victory is a technical one devoid of practical benefit to them. As a result of their efforts and our decision, the appellants have attained nothing more than " 'the moral satisfaction [that] results from any favorable statement of law,' " *Farrar,* 113 S.Ct. at 573-74 (quoting *Hewitt v. Helms,* 482 U.S. 755, 762, 107 S.Ct. 2672, 2676 (1987); such satisfaction "cannot bestow prevailing party status." *Id.* at 574.

(App. A, 4a).

This Petition seeks review of that Order denying "prevailing party" status and thus denying Petitioners' Motion for Attorneys' fees under 42 U.S.C. § 1988.

B. Statement of the Facts

(i) The Parties and the Procedures

The candidate Petitioners, Republican David Duke and Democrats Larry Agran, Patrick Mahoney and Lyndon LaRouche, sought to have their names placed on their respective party's 1992 Presidential Preference Primary ballot in Florida. The procedure for placing names on the presidential primary ballot is contained in § 103.101, Fla. Stat. (App. E, 40a-42a). In relevant part, the statute creates the Presidential Candidate Selection Committee, and prescribes two meetings, and their dates, for the Committee. Respondents, by virtue of their respective offices (Secretary of State, Speaker of the Florida House, President of the Florida Senate, Minority Leader of the Florida House, Minority Leader of the Florida Senate, Chairman of the Florida Democratic Party, Chairman of the Florida Republican Party), comprise the Presidential Candidate Selection Committee created by § 103.101(2).

At the first meeting, the Chairman presents those names supplied by the political parties as presidential primary candidates. Those names will appear on the ballot unless unanimously vetoed by the Committee members of the same political party. Aspiring candidates excluded from the list may request reconsideration. If necessary, the Committee reconvenes to reconsider those names. No alternative mechanism exists for Republicans or Democrats to appear on the primary ballot.

Pursuant to § 103.101(2)(a), prior to the first statutorily mandated Presidential Candidate Selection Committee meeting, the Florida Democratic Party and the Florida Republican Party each submitted a list of names for the presidential preference primary ballot to the Secretary of State. Plaintiffs Agran, Mahoney, and LaRouche were not on the list, because according to the

Democratic Chairman, "[t]hose people did not meet the criteria that we have established in order to be designated on that ballot."

The Chairman of the Republican Party explained that his party picked candidates that "believe in the values and the principles of the Republican Party and have demonstrated this." The Republican Party Chairman concluded that Duke was "not a Republican," and that Duke's beliefs were not consonant with how the Chairman viewed the Republican Party. The list of Republican presidential primary candidate choices submitted included two names: President George Bush and Patrick Buchanan.

The Committee met a second time on January 16, 1992, in response to the formal requests of the thirty-two excluded candidates who sought reconsideration under § 103.101(2)(c), including Petitioners Duke, Agran, Mahoney, and LaRouche. The 32 names were read by the Chairman, and there was no discussion. No candidate requesting reconsideration received any reconsideration, and no new names were added to the ballot. The meeting was adjourned in less than five minutes.

(ii) The Judicial Decisions and the Denial of Fees

The district court denied all of Petitioners' claims for relief, based upon a finding that the actions of the Committee were private political party decisions, and did not constitute "state action" as required under 42 U.S.C. § 1983. (App. D, 35a).

The Eleventh Circuit concluded that at the reconsideration stage the Committee's decisions *did* constitute "state action," and that both the statutory scheme and the Committee's treatment of David Duke were unconstitutional. (App. C, 15a-19a, 22a-23a). Thus, due to the district court's error Petitioners were denied ballot-access injunctive relief, but ultimately they did receive the declaratory relief they had sought. The appellate court's post-

decision ruling that, nonetheless, Petitioners were not "prevailing parties" under § 1988 and *Farrar v. Hobby,* 113 S. Ct. 566 (1992), and that their Motion for Attorneys' Fees should be denied (App. A, 1a-4a), is the Order sought to be reviewed in this Court.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS AN IMPORTANT, UNANSWERED QUESTION, AND CONFLICTS WITH SUPREME COURT AND STATUTORY LAW: *FARRAR V. HOBBY,* 113 S. CT. 566 (1992), DOES NOT PRECLUDE AN AWARD OF 42 U.S.C. § 1988 ATTORNEYS' FEES TO PLAINTIFFS WHOSE "CAPABLE OF REPETITION YET EVADING REVIEW" APPELLATE REVERSAL OF AN ERRONEOUS DISTRICT COURT DECISION RESULTED IN A DECLARATORY JUDGMENT THAT A STATUTE IS UNCONSTITUTIONAL AND A FINDING OF DENIAL OF FIRST AMENDMENT RIGHTS.

This case presents the important unanswered question of the meaning of "prevailing party" in civil rights litigation which remains justiciable and is successfully litigated on appeal under the "capable of repetition yet evading review" exception to mootness. The question is important because the meaning of Congress' 42 U.S.C. § 1988 promise of attorneys fees to those who litigate to stop or redress civil rights violations rests on the answer. The court below believed that its "capable of repetition yet evading review" decision reversing a district court's denial of declaratory and injunctive relief was too late to make plaintiffs "prevailing parties" under § 1988. This Court has never considered the question.

The Eleventh Circuit held that Petitioners, whose claims for ballot-access *injunctive* relief became moot prior to their appellate reversal of an erroneous district court decision, are not "prevailing

parties" under *Farrar v. Hobby,* 113 S. Ct. 566 (1992), because they did not derive any direct benefit from their appellate victory. That decision distorts this Court's "prevailing party" precedents. Thus, this case presents conflict with *Farrar,* and requires guidance on an important but unanswered question of federal civil rights law.

Farrar v. Hobby did not decide whether the "capable of repetition yet evading review" doctrine is an exception to the requirement of "direct benefit" to the plaintiff. *Farrar v. Hobby* did not decide that a plaintiff is not a prevailing party where, but for the district court's error, the plaintiff would have directly benefitted. *Farrar v. Hobby* did not decide whether a declaratory judgment that a ballot access statute is unconstitutional is, in itself, sufficient to confer attorneys fee "prevailing party" status on voters and would-be candidates from that state.

Farrar v. Hobby held that in a damages case, a plaintiff who is awarded nominal damages *is* a "prevailing party" for 42 U.S.C. § 1988 purposes.[1] *Id.* at 570. Reviewing three recent decisions on who is a prevailing party, the Court distilled the following definition:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least *some relief on the merits* of his claim. The plaintiff must obtain an *enforceable judgment* against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must *directly benefit him* at the time of the judgment or settlement. . . . In short, a plaintiff "prevails" when actual relief on the merits of

1. Petitioners made no claims for damages in this case.

> his claim materially alters the legal relationship between the parties by *modifying the defendant's behavior in a way that directly benefits the plaintiff.*

Id. at 573 (citations omitted) (emphasis supplied).

Farrar ended the confusion over whether a plaintiff who receives nominal damages is a prevailing party (he is). *Farrar* also teaches that not every prevailing plaintiff is necessarily entitled to an award of attorneys fees. But the denial of fees to a plaintiff who prevails is the exception, rather than the rule. In denying fees to Petitioners, the Eleventh Circuit misapplied *Farrar.*

The Eleventh Circuit denied fees in this case at the first stage of the § 1988 inquiry, finding that "[t]hese appellants did not directly benefit from the relief they achieved" in their reversal of the district court's decision, and that therefore they were not "prevailing parties." (App. A, 3a). That Order conflicts with this Court's "generous formulation" of the term.

> Under our "generous formulation" of the term, " 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on *any significant issue in litigation* which achieves some of the benefit the parties sought in bringing suit.' " *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (quoting *Nadeau v. Helgemoe,* 581 F.2d 275, 278-279 (CA1 1978)).

Farrar, 113 S. Ct. at 572 (emphasis supplied).

Petitioners succeeded on the merits on a significant issue in

this case: they obtained a declaratory judgment that § 103.101(2)(c), Fla. Stat. is unconstitutional. (App. C, 23a). Petitioner Duke obtained a finding that his exclusion from the ballot violated the First Amendment. (App. C, 22a). *Farrar v. Hobby* said that " '[l]iability on the merits and responsibility for fees go hand in hand. . .,' " 113 S. Ct. at 572, *quoting Kentucky v. Graham,* 473 U.S. 159, 165, 105 S. Ct. 3099, 3104, 87 L. Ed. 2d 114 (1985). The court below failed to apply that standard, and denied fees based on speculation about how Respondents will or will not respond to the Court of Appeals' decision that the State's ballot access procedures were unconstitutional. (App. A, 4a). Clearly Petitioners succeeded on the merits of a substantial issue in the case—their request for a declaratory judgment about Florida's ballot access statute and the violation of Petitioner Duke's First Amendment rights. Had the district court not erred, the Petitioners would have directly benefited *via* an injunction mandating inclusion of their names on the respective presidential primary ballots.[2]

Because *Farrar* made clear that there are considerations other than success on the merits which guide a court's discretion in making fee awards, we review this Court's "prevailing party" cases

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2. The Eleventh Circuit's fee denial order said "even if the primary were approaching, not receding" its decision would not benefit the Petitioners because the decision left intact the "initial determination process" (*i.e.,* § 103.101(2)(a), Fla. Stat.) which would still have resulted in ballot exclusion for the Petitioners. (App. A, 3a). Whether the initial determination process, standing alone, is constitutional, was another question for another day. Moreover, the Eleventh Circuit's rationale is irrelevant as to Duke, whose exclusion was "due to his speech and association," in violation of the First Amendment. (App. C, 23a). That rationale also overlooks the remedy which would have been available to all the candidate Petitioners *but for* the district court's error: an injunction placing them on the ballot. Since the statute mandated reconsideration, if that process resulted in a constitutional violation, the cure was inclusion; the litigation sought a real remedy, not an advisory opinion.

discussed in *Farrar*, to illustrate that none fits the facts of this case; if anything the general principles of those cases establish conflict with the Eleventh Circuit's denial of fees in this case.

The earliest decision, *Hewitt v. Helms*, 482 U.S. 755, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987), denied fees to a prisoner-litigant who was released prior to final judgment. It is distinguishable from the instant case because of that plaintiff's total lack of success:

> This case presents the peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a "prevailing party" for purposes of an award of attorney's fees.

Id. at 757, 107 S. Ct. at 2674.

> Whatever the outer boundaries of that term may be, Helms does not fit within them. Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail. Helms obtain no relief . . . he received no damages. . . . No injunction *or declaratory judgment* was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment. . . . The most he obtained was an interlocutory ruling that his complaint should not have been dismissed for failure to state a constitutional claim. That is not the stuff of which legal victories are made.

Id. at 759, 107 S. Ct. at 2675-76 (citations omitted) (emphasis supplied). In this case, unlike *Helms*, a declaratory judgment *was* entered in Petitioners' favor. In *Helms*, the plaintiff actually lost:

> We conclude that a favorable judicial statement of the law in the course of litigation that results in judgment *against the plaintiff* does not suffice to render him a "prevailing party." Any other result strains both the statutory language and common sense.

Id. at 763, 107 S. Ct. at 2677 (emphasis supplied). Petitioners in this case obtained more than a mere favorable judicial statement of the law—they received a judgment in their favor, a guarantee that § 103.101(2)(c) cannot be used to deny them ballot access in the future, and protection against exclusion from the ballot as a punishment for First Amendment activities. Thus, *Hewitt v. Helms* is inapposite, and does not support the decision below.

The next "prevailing party" case is also substantially different from the instant case. *Rhodes v. Stewart,* 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988), denied fees to former-prisoner plaintiffs who had brought a civil rights suit against prison officials, because although a declaratory judgment was entered in plaintiffs' favor by the district court, by that time "one of the plaintiffs had died and the other was no longer in custody." *Id.* at 2, 109 S. Ct. at 202. Their personal claims against prison officials for certain conditions of their confinement were thus truly moot and were not saved by the "capable of repetition yet evading review" exception to mootness:

> The case was *moot before judgment issued,* and the judgment therefore afforded the plaintiffs no relief whatsoever.

Id. at 4, 109 S. Ct. at 203-204 (emphasis supplied). *Rhodes v. Stewart,* like *Helms,* came to this court on most unusual facts — the litigation inexplicably continued long past the time the case was moot, without objection by the defendants. In this case, the Petitioners would have directly benefited from a correct district

court judgment. And the "capable of repetition yet evading review" exception was properly invoked by the Eleventh Circuit.

The former prisoners in *Helms* and *Stewart* are distinguishable from Petitioners in this case, who, unless they appealed the district court decision, would have faced election after election hampered by an unconstitutional state scheme for ballot access, with no time for full appellate legal redress. The Eleventh Circuit's speculation about how the State may choose to correct its deficient procedures (App. A, 3a) is not determinative. We do know that as a result of the decision below Respondents may *not* utilize section 103.101(2)(c), Fla. Stat., in the future, because it is unconstitutional. We do know that Respondents may not again exclude David Duke from the ballot solely because of his political beliefs. As a result, Florida voters, including Petitioners, have directly benefitted as required by *Farrar.*[3]

The final pre-*Farrar* "prevailing party" case, which "synthesized the teachings of *Hewitt* and *Rhodes,*" 113 S. Ct. at 572, was *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989). *Garland* held that a party who prevails on "any significant issue" qualifies as a "prevailing party."

> If the plaintiff has succeeded on "any significant issue in litigation which

3. Even if we accept the Eleventh Circuit's contention that Petitioners did not "directly benefit" from the favorable decision, we submit that a case which retains its justiciability under the "capable of repetition yet evading review" doctrine should be exempt from the "direct benefit" requirement discussed in *Farrar.* 113 S. Ct. at 573. There is an acknowledged public benefit to judicial resolution of certain "moot" cases, and those plaintiffs whose efforts result in that public benefit should not be denied the "private attorney general" attorney's fees contemplated by Congress when it passed § 1988. *See City of Riverside v. Rivera,* 477 U.S. 561, 575-580, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986). This, too, is part of the importance of the question presented by the decision below.

> achieved[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind. *Nadeau*, 581 F.2d at 278-279. . . . Thus, at a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

Id. at 1493.

Petitioners' successful resolution of their dispute with Respondents over Florida's Presidential Preference Primary election ballot access is indisputable: Florida may not continue its past methodology. Indeed, in the Order denying fees the Eleventh Circuit recognized that "[t]he behavior of the appellees will change as a result of our ruling . . . . " (App. A, 3a). Petitioners therefore met the "any significant issue" and changed relationship tests of *Garland*, and crossed the threshold to a fee award. The decision below thus presents conflict with prior precedents and an important question of civil rights law under 42 U.S.C. § 1988.

Many important civil rights decisions have been obtained by plaintiffs whose cases—like this one—were technically moot but which remained justiciable because the claims were "capable of repetition yet evading review."[4] Awarding fees in such cases serves to promote the purpose of § 1988, which is to encourage individuals to seek legal redress of unconstitutional state action, despite the substantial cost of litigation. *City of Riverside v. Rivera*, 477 U.S. 561, 575-580, 106 S. Ct. 2686, 91 L. Ed. d 466 (1986) (plurality); The Civil Rights Attorney's Fees Awards Act of 1976,

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4. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 107 n. 2, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975); *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 89 S. Ct. 1493, 23 L. Ed. 2d 1 (1969); *Southern Pacific Co. v. Interstate Commerce Comm'n*, 219 U.S. 433, 31 S. Ct. 288, 55 L. Ed. 283 (1911).

S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.Code Cong. & Admin. News 5908, 5910, 5912.

CONCLUSION

The decision below conflicts with the purpose of § 1988, and conflicts with *Farrar, Helms, Rhodes,* and *Garland.* It presents an important unanswered question about "prevailing party" status when justiciability of otherwise moot claims is preserved under the "capable of repetition yet evading review" doctrine. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX A — APRIL 6, 1994 ELEVENTH CIRCUIT ORDER DENYING ATTORNEYS' FEES

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4093

DAVID DUKE,
PATRICK J. MAHONEY,
LARRY AGRAN,
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DAVID BALDWIN,
EDWARD J. ROSENFELD,
EUGENE COTTRELL,
CLAIRE URDL,
WILLIAM EDWARD BONNELL,
SUSAN BROOKS THOMAS,

Filed: April 6, 1994

Plaintiffs-Appellants,

versus

JIM SMITH, Secretary of State,
T.K. WETHERELL,
GWEN MARGOLIS,
JAMES M. LOMBARD,
ANDER CRENSHAW,
SIMON FERRO,
VAN POOLE,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Florida

Appendix A

BEFORE: CARNES, Circuit Judge, and FAY* and JOHNSON, Senior Circuit Judges.

BY THE COURT:

The appellants in *Duke v. Smith,* 13 F.3d 388 (11th Cir. 1994) have moved for an award of attorney's fees on appeal. That case involved Fla. Stat. § 103.101, which governs access to the Florida presidential primary ballot. Subsection 103.101(2)(c) allowed candidates whose names were not placed on the ballot to petition the selection committee to "reconsider placing the candidate's name on the ballot." Fla. Stat. § 103.101(2)(c). Reversing the district court, we held that in ruling on requests for reconsideration, the selection committee was a state actor for constitutional purposes. *Duke,* 13 F.3d at 393-94. Because "there are no standards governing the exercise of the [selection committee's] discretion," *id.* at 395 (quoting *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170, 92 S. Ct. 839, 847 (1972)), we refused to "allow continued operation of the reconsideration process[.]" *id.*

The appellants in *Duke v. Smith,* who are the movants in this matter, were candidates whose requests for reconsideration were denied and registered voters who wished to vote for them. They claim that they are prevailing parties within the meaning of 42 U.S.C. § 1988 and are therefore entitled to an award of attorney's fees on appeal. We disagree. Under the analysis applied by the Supreme Court in *Farrar v. Hobby,* 113 S. Ct. 566 (1992), these appellants are not prevailing parties.

The appellants did not request monetary damages in the

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* *See* Rule 34-2, Rules of the U.S. Court of Appeals for the Eleventh Circuit.

district court, but instead sought a declaratory judgment that section 103.101 was unconstitutional and an injunction requiring the Secretary of State of Florida to place their names on the 1992 Florida presidential primary ballot. The district court denied that relief. On appeal the appellants argued *only* that subsection 103.101(2)(c), which is the reconsideration process, was unconstitutional. *Duke,* 13 F.3d at 392. Our holding of unconstitutionality affected only the reconsideration process, not the entire primary ballot system. The behavior of the appellees will change as a result of our ruling; the appellants could seek to hold the appellees in contempt were they to apply the reconsideration process of subsection 103.101(2)(c) in the future. However, more is required under *Farrar* for a party to be a "prevailing party" entitled to an award of attorney fees. The Supreme Court held in *Farrar* that not only must the plaintiff obtain at least some relief on the merits in order to achieve prevailing party status for attorney fee purposes, but also that "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." 113 S. Ct. at 573. These appellants did not directly benefit from the relief they achieved in *Duke v. Smith.*

The 1992 presidential primary is but a distant memory; but, even if the primary were approaching instead of receding, our decision in *Duke v. Smith* would not benefit the appellants. Although we struck down the reconsideration process, the appellants did not challenge the method by which the list of primary candidates is determined as an initial matter. In our opinion, we suggested that the initial determination process, embodied in section 103.101(2)(a), was constitutional because "the autonomous political parties' First Amendment rights take their motivation for exclusion (or inclusion) [of potential candidates] outside the ambit of state action." *Duke,* 13 F.3d at 391 n.3. It is through that initial determination process, which the

defendants did not challenge and which we left intact, that the appellants were excluded from the 1992 primary ballot, and through which they can be excluded from any future primary ballot. Indeed, as the appellees point out, the appellants originality had two opportunities for ballot access — the initial selection process and the reconsideration process; they have "succeeded" in eliminating one of them, effectively halving their number of opportunities for getting on the Florida primary ballot.

The appellants argue that as a result of our ruling, "[t]he State will have to change its statute, or the Defendants will have to give relief to all candidates seeking reconsideration from Presidential Preference Primary ballot exclusion." Not so. The appellants point to no case or constitutional principle that obligates the Florida legislature to provide an appeals process for disgruntled presidential candidates. As a result of our holding, there will be no means for disappointed candidates to appeal their omission from the primary ballot, unless and until the Florida legislature of its own free will decides to enact a new reconsideration mechanism. Nothing in the decision which the appellants obtained from this Court obliges Florida to adopt a new reconsideration procedure of any type in place of the unconstitutional procedure that we struck down.

Thus, the appellants' victory is a technical one devoid of practical benefit to them. As a result of their efforts and our decision, the appellants have attained nothing more than " 'the moral satisfaction [that] results from any favorable statement of law,' " *Farrar,* 113 S. Ct. at 573-74 (quoting *Hewitt v. Helms,* 482 U.S. 755, 762, 107 S. Ct. 2672, 2676 (1987)); such satisfaction "cannot bestow prevailing party status." *Id.* at 574.

The appellants' motion for attorney's fees on appeal is DENIED.

APPENDIX B — MAY 26, 1994 JUDGMENT AND MANDATE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 92-4093

D.C. Docket No. 92-134-CIV

DAVID DUKE,
PATRICK J. MAHONEY,
LARRY AGRAN,
LYNDON H. LaROUCHE, JR., Filed February 3, 1994
GUILLERMO SANCHEZ,
TASHARAY S. OTWAY-SMITHERS,
DAVID BALDWIN,
EDWARD J. ROSENFELD,
EUGENE COTTRELL,
CLAIRE URDL,
WILLIAM E. BONNELL,
and SUSAN B. THOMAS,

Plaintiffs-Appellants,

versus

JIM SMITH, Secretary of the State of Florida,
T.K. WETHERELL, Speaker of the
Florida House of Representatives,
GWEN MARGOLIS, President of the
Florida Senate,
JAMES M. LOMBARD, Minority Leader
of the Florida House of Representatives,
ANDER CRENSHAW, Minority Leader
of the Florida Senate,

Appendix B

SIMON FERRO, Chairman of the
Florida Democratic Party, and
VAN POOLE, Chairman of the
Florida Republican Party, in
their capacities as members of the
Presidential Candidate Selection
Committee,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

Before CARNES, Circuit Judge, FAY* and JOHNSON, Senior Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the order of the said District Court appealed from in this District Court be and the same is hereby REVERSED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay plaintiffs-appellants the costs on appeal to be taxed by the Clerk of this Court.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

Appendix B

Entered: February 3, 1994
For the Court: Miguel J. Cortez, Clerk

By: s/ Matt Davidson
Deputy Clerk

ISSUED AS MANDATE: 5/26/94

APPENDIX C — ELEVENTH CIRCUIT DECISION ON THE MERITS, 13 F.3D 388 (11TH CIR. 1994)

David DUKE, Patrick J. Mahoney, Larry Agran, Lyndon LaRouche, Jr., Guillermo Sanchez, Tasharay S. Otway-Smithers, David Baldwin, Edward J. Rosenfeld, Eugene Cottrell, Claire Urdl, William E. Bonnell, and Susan B. Thomas, Plaintiffs-Appellants,

v.

Jim SMITH, Secretary of the State of Florida, T.K. Wetherell, Speaker of the Florida House of Representatives, Gwen Margolis, President of the Florida Senate, James M. Lombard, Minority Leader of the Florida House of Representatives, Ander Crenshaw, Minority Leader of the Florida Senate, Simon Ferro, Chairman of the Florida Democratic Party, and Van Poole, Chairman of the Florida Republican Party, in their capacities as members of the Presidential Candidate Selection Committee, Defendants-Appellees.

No. 92-4093.

United States Court of Appeals,
Eleventh Circuit.

Feb. 3, 1994.

* * *

Bruce Rogow, Beverly A. Pohl, H. Collins Forman, Jr., Fort Lauderdale, FL, Nina Vinik, American Civil Liberties Union of Florida Foundation, Inc. Miami, FL, for plaintiffs-appellants.

Appendix C

Mark Levine, Tallahassee, FL, for Simon Ferro, State Chairman of the FL Demo Party.

E. Thom Rumberger, Sharon L. Stedman, Daniel J. Gerber, Orlando, FL, for Van Poole, Lombard, Crenshaw.

George L. Waas, Dept. of Legal Affairs, Tallahassee, FL, for Smith, Wetherell and Magolis.

Appeal from the United States District Court for the Southern District of Florida.

Before CARNES, Circuit Judge, and FAY* and JOHNSON, Senior Circuit Judges.

FAY, Senior Circuit Judge:

David Duke filed an action pursuant to 42 U.S.C. § 1983 in the District Court for the Southern District of Florida[1] challenging Florida Statutes § 103.101 which governs access to the presidential primary ballot in Florida. The district court consolidated the preliminary injunction hearing with the trial and denied relief to all of the plaintiffs. Because we find state action, we REVERSE.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

1. Several other plaintiffs joined Duke in this action: Patrick J. Mahoney, Larry Agran, Lyndon H. LaRouche, Jr., Guillermo Sanchez, Tasharay S. Otway-Smithers, David Baldwin, Edward J. Rosenfeld, Eugene Cottrell, William E. Bonnell, and Susan B. Thomas. The Plaintiff-Appellants will be collectively referred to as "Plaintiffs" unless indicated otherwise.

Appendix C

I. FACTS

Florida Statutes § 103.101 entitled "Presidential preference primary" is the exclusive vehicle through which a person may gain access to the Florida presidential preference primary ballot ("Ballot").[2] The Plaintiffs sought to have their names placed on

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2. The statute provides, in relevant part:

> (2) There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a nonvoting chairman; the speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the Legislature; and the chairman of each political party required to have a presidential preference primary under this section.
>
> (a) By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the First Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his name appear, or have his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political party as the candidate agree to delete such candidate's name from the ballot.

(Cont'd)

the 1992 Ballot in Florida. To that end, they followed the procedures contained in Florida Statutes § 103.101 and submitted their names to the Presidential Candidate Selection Committee

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(Cont'd)

> The selection committee shall meet in Tallahassee on the first Tuesday after the first Monday in each year a presidential preference primary is held. The selection committee shall publicly announce and submit to the Department of State no later than 5 p.m. on the following day the names of the presidential candidates who shall have their names appear, or who are entitled to have their delegates' names appear, on the presidential preference primary ballot. The Department of State shall immediately notify each presidential candidate designated by the committee. Such notification shall be in writing, by registered mail, with return receipt requested.
>
> (b) Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his name on the ballot. Such request shall be made in writing to the Secretary of State no later than the second Tuesday after the first Monday in January.
>
> *(c) If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot. The Department of State shall immediately notify such candidate of the selection committee's decision.*

Fla. Stat. § 103.101(2) (1991) (emphasis added).

("Committee"). The defendants in this case, Jim Smith, T.K. Wetherell, Gwen Margolis, James M. Lombard, Ander Crenshaw, Simon Ferro, and Van Poole, comprise the Committee described in the statute.

Pursuant to § 103.101(2)(a), following the plaintiffs' submissions, the representatives of the Florida Democratic and Republican Parties gave a list of their respective candidates for the Ballot to the Secretary of State, Jim Smith.[3] None of the Plaintiffs were on either list submitted to the Secretary of State.

Accordingly, thirty-two candidates, including plaintiffs Duke, Agran, Mahoney, and LaRouche, petitioned the Secretary of State pursuant to § 103.101(2)(b) to have their names reconsidered for inclusion on the Ballot.[4] Subsequently, the Secretary of State requested that the Committee reconvene to reconsider the Plaintiffs' requests. On January 16, 1992, pursuant to § 103.101(2)(c), the Committee reconvened and the Secretary of State read the names of 32 candidates who submitted formal requests for reconsideration. After he read the names, there was no response from the Committee and the Secretary of State stated:

> Would anyone like to make a motion? Hearing none—is there any other business to come

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3. We will not consider the procedures that the respective political parties employed in determining which candidates to submit under subsection (2)(a) because at the stage of the process, the autonomous political parties' First Amendment rights takes their motivation for exclusion (or inclusion) outside the ambit of state control. *See, e.g., Democratic Party v. Wisconsin*, 450 U.S. 107, 123-24, 101 S.Ct. 1010, 1019-20, 67 L.Ed.2d 82 (1981); *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307-08, 38 L.Ed.2d 260 (1973).

4. The parties stipulated at trial that the Plaintiffs complied with the requirements outlined in § 103.101.

> before this committee? This is one of the most efficient committees *in government* today, I think. There is no discussion—we are done. Meeting adjourned.

Van Poole Exh. 2; RE-8 (emphasis added).

Following the Committee's rejection of the Plaintiffs' petitions for reconsideration, the Plaintiffs filed suit[5] and alleged that the reconsideration process was unconstitutionally vague and allowed arbitrary capricious government action which violated their First and Fourteenth Amendment rights. Pursuant to Fed.R.Civ.P. 65(2), the district court held a consolidated trial preliminary injunction evidentiary hearing on January 28, 1992. The district court found that the Plaintiffs failed to prove state action and entered judgment in favor of the Defendants on that basis.

The Plaintiffs appeal the above order and raise the following issues:[6]

> I. Whether this challenge to a presidential primary ballot access statute is capable of repetition yet evading review, and thus

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5. The Plaintiffs sought injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 and 2202 respectively.

6. Stephen A. Koczak filed an emergency motion to intervene which the district court dismissed as untimely. We consolidated his separate appeal of that dismissal with the instant case. We review that order under an abuse of discretion standard. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263 (5th Cir. 1977), *citing NAACP v. New York*, 413 U.S. 345, 367, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973). Because we find no such abuse, we affirm the dismissal.

justiciable under the United States Constitution Art. III § 2?[7]

II. Whether the actions of the Presidential Candidate Selection Committee under Florida Statute § 103.101(2)(c) are under color of state law for purposes of liability under Title 42 U.S.C. § 1983?

III. Whether § 103.101(2)(c) governing the reconsideration of excluded candidates by the Presidential Candidate Selection Committee violates the Fourteenth Amendment to the United States Constitution because it lacks any standards and allows arbitrary and capricious governmental action?

IV. Whether the Presidential Candidate Selection Committee violated Plaintiff David Duke's First and Fourteenth Amendment rights by excluding that candidate from the Presidential Primary Ballot because of his political beliefs?

We have jurisdiction pursuant to 28 U.S.C. § 1291. Because we find that the Committee acted under the color of state law during the reconsideration process, we reverse.

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7. We agree with both parties that this case falls within the "capable of repetition yet evading review" exception to the mootness doctrine and we will not further address this issue. *Duke v. Cleland*, 954 F.2d 1526, 1528 (11th Cir. 1992).

Appendix C

II. DISCUSSION

We review the district court's order *de novo* because the issue of state action is a mixed question of law and fact. *Albright v. Longview Police Dept.*, 884 F.2d 835, 838 (5th Cir. 1989).

1. *State Action*

In order to prevail on a § 1983 claim, the Plaintiffs must show that: (1) the conduct complained of was committed by a person acting under the color of state law; and (2) the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986); *Burch v. Apalachee Community Mental Health Services, Inc.*, 840 F.2d 797, 800 (11th Cir. 1988), *aff'd by Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990).

Our inquiry into the state action question will focus narrowly on the reconsideration provisions of § 103.101(2)(c) as it is the only subsection of the statute which the Plaintiffs address on appeal.[8] Subsection (2)(c) states:

(c) If a presidential candidate makes a request

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8. We find no merit in the defendants' argument that this subsection was not properly preserved for appeal. The *entire* statute was the basis of the lawsuit. Furthermore, the record reflects discussion of subsection (2)(c) and Plaintiffs' counsel pointed out that "[t]his lawsuit deals with [§ 103.101 subsection] 2, mostly B and C." (R2-143). Accordingly, we find that the district court had ample opportunity to examine the portion of the statute that is now on appeal.

> that the selection committee reconsider placing the candidate's name on the ballot, the *selection committee* will reconvene no later than the second Thursday after the first Monday in January to *reconsider placing the candidate's name on the ballot.* The Department of State shall immediately notify such candidate of the *selection committee's decision.*

Fla. Stat § 103.101(2)(c) (1991) (emphasis added).

In *Duke v. Cleland,* 5 F.3d 1399 (11th Cir. 1993) ("*Duke II*"), this Court examined a similar presidential primary ballot access statute in Georgia. The Georgia statute grants the Secretary of State the power to create the initial list of candidates which is then submitted to the committee members[9] of the same political party as the candidate. The candidate's name appears on the presidential primary ballot unless all committee members of the same political party as the candidate agree to delete the candidate's name from the ballot. In a similar analysis of the state action issue, we held that:

> Party membership is no concern of the state. *Smith v. Allwright,* 321 U.S. 649, 664 [64 S.Ct. 757, 765, 88 L.Ed. 987] (1944); *see also Democratic Party v. Wisconsin ex rel. Lafollette,* 450 U.S. 107 [101 S.Ct. 1010, 67 L.Ed.2d 82] (1981). An entity may, however, become "so impregnated with a governmental character as to become subject to the constitutional

9. The Georgia committee is comprised of precisely the same members as is the Florida committee.

limitations placed upon state action." *Evans v. Newton,* 382 U.S. 296, 299 [86 S.Ct. 486, 488, 15 L.Ed.2d 373] (1966). When as here the state empowers its officials to exclude presidential aspirants from the presidential primary ballot, the power exercised is directly attributable to the state. *Allwright,* 321 U.S. at 664-65 [64 S.Ct. at 765]. Indeed the Committee performs a critical public function by limiting the electorate's voting choices to its candidates only. *See id.*

That the Committee exercises judgment independent of the state does not necessarily negate state action. *See Terry v. Adams,* 345 U.S. 461, 469 [73 S.Ct. 809, 813, 97 L.Ed. 1152] (1953). The Committee acts in "matters of high public interest, matters intimately connected with the capacity of government to exercise its functions unbrokenly and smoothly." *Nexon v. Condon,* 286 U.S. 73, 88 [52 S.Ct. 484, 487, 76 L.Ed. 984] (1932). Its power to restrict ballot access flows directly from the state *ab initio. See Allwright,* 321 U.S. at 664 [64 S.Ct. at 765].

. . . . .

Indeed, the Committee's determinations are essentially unreviewable by the party membership. The Committee's power is such that it alone may declare who is fit to run, and who, by extension, is fit to govern. As the

> *product of state legislative choice, the Committee's power constitutes "state action" within the meaning of the Fourteenth Amendment. Bullock v. Carter,* 405 U.S. 134, 140 [92 S.Ct. 849, 854, 31 L.Ed.2d 92] (1972).

Duke II at 1403-04 (emphasis added) (footnote omitted).

Although the operation of the Georgia statute differs from that of the Florida statute, any distinction is purely academic.[10] The net result of both statutes is that the bipartisan state-created Committees are inextricably interwined with the process of placing candidates names on the ballot, and the state-created procedures, not the autonomous political parties, make the *final* determination as to who will appear on the ballot in each primary election.[11]

Section 103.101(2)(c) does not leave the *individual* political parties the discretion to review a candidate's reconsideration. Rather, because the Florida legislature has given the Committee

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10. Namely, the distinction is that in Georgia, the statute mandates that the Secretary of State independently determine what names will be submitted to the political parties for consideration. In Florida, the statute calls for a bipartisan committee to serve as the final gate through which all candidates must flow before securing a place on the ballot. In either instance, a state-mandated procedure grants a person or group the unfettered discretion to make the ultimate determination of who will or will not appear on the primary ballot.

11. Much of the district court's analysis turned on the role of the Secretary of State acting alone in a non-voting ministerial capacity. Although we do not necessarily disagree with the district court's determinations in that respect, we think that the inquiry must go further to encompass the entire statute; namely the reconsideration provisions.

power to "declare [during the reconsideration process] who is fit to run, and who, by extension is fit to govern," *Duke II* at 1404, we are bound by the new precedent in this Circuit and hold that the procedures outlined in § 103.101(2)(c) constitute state action. *Id.; See also Gray v. Sanders,* 372 U.S. 368, 374, 83 S.Ct. 801, 805, 9 L.Ed.2d 821 (1963) (holding that state regulation of the preliminary phase of the election process may constitute state action).

2. *Deprivation*

Having satisfied the first prong of the § 1983 analysis by finding state action, we now turn to the second prong to determine whether the Plaintiffs suffered a deprivation of any constitutional right, privilege or immunity through the Committee's application of the reconsideration procedure outlined by § 103.101(2)(c).[12]

The Supreme Court has adopted a "flexible approach to determine the proper standard of judicial review to be applied in ballot access cases. . . ." *Duke II* at 1404, *citing Anderson v. Celebrezze* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983).[13] To determine the applicable level of scrutiny to apply in our analysis of the reconsideration procedure, we follow the Court's recent interpretation of *Anderson* which held that:

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12. It should be noted that Defendants Poole, Crenshaw and Lombard conceded that if this Court found state action, then § 103.101 is unconstitutional. (R1-31-4, 5). However, for the purpose of clarity, we will analyze the operation of the subsection in question.

13. The *Anderson* Court adopted a balancing test that allows the analysis to shift from strict scrutiny to a rational-basis test depending on the facts of each case. *Fulani v. Krivanek,* 973 F.2d 1539, 1543 (11th Cir. 1992).

Appendix C

> A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the state as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiffs rights.'

Burdick v. Takushi, __ U.S. __, __, 112 S.Ct. 2059, 2063, 119 L.Ed.2d 245 (1992), *citing Anderson v. Celebrezze*, 460 U.S. 780, 789, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

Generally, the state may impose reasonable requirements for access to a presidential primary ballot. *Burdick*, __ U.S. at __, 112 S.Ct. at 2063. Every provision in election laws, "whether [they] [govern] the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his [or her] right to associate with others for political ends." *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

As we noted in *Duke II*, "when the state election scheme burdens a fundamental constitutional right severely, it may survive only if it is narrowly tailored to advance a compelling state interest." *Duke II* at 1405, *citing Burdick*, __ U.S. at __, 112 S.Ct. at 2063. On the contrary, when the challenged provision imposes only "reasonable, nondiscriminatory restrictions" upon voters' First and Fourteenth Amendment rights, "the State's important

regulatory interests are generally sufficient to justify the restrictions." *Id.* (Citations omitted).

The First and Fourteenth Amendment rights which the Plaintiffs seek to vindicate are: (1) the voters' rights to vote for the candidates of their choice; (2) Duke's right not to be eliminated from the reconsideration process because of his political beliefs and expressions (free speech); and (3) the candidates' rights to have their reconsideration petitions judged by articulated standards (procedural due process). These rights must be weighed against the interests put forward by the state as justifications for the burden imposed by the reconsideration procedure.

Here, the state offered only enough justification for the statute for the district court to determine that "[t]he evidence before this Court suggests that, at best, the meeting of the Presidential Candidate Selection Committee provides a definite meeting time for decision for political parties to transmit the names of their presidential preference primary candidates to the Secretary of State." *Duke v. Smith,* 784 F. Supp. 865, 871 (S.D. Fla. 1992). Of course, this could be accomplished by a short simple statutory requirement setting such a deadline.

In balancing the Plaintiffs' various constitutional rights against a convenient vehicle through which the Secretary of State may compile and finalize a list of primary candidates, the scales tip in favor of the Plaintiffs in this case. Because we find that the Plaintiffs' constitutional rights are subjected to severe restrictions, namely the Committee's unfettered discretion to exclude candidates who have petitioned for reconsideration, we will analyze § 103.101(2)(c) under a strict scrutiny test to determine if it is "narrowly tailored to advance a compelling state interest."

Burdick, __ U.S. at __, 112 S.Ct. at 2063. *See also Norman v. Reed*, __ U.S. __, __, 112 S.Ct. 698, 705, 116 L.Ed.2d 711 (1992).[14]

Only a portion of one sentence contained in § 103.101(2)(c) addresses the means through which candidates are reconsidered for placement on the ballot. It states that "the selection committee will reconvene . . . to reconsider placing the candidate's name on the ballot." This language is far from narrow construction and clearly lacks any articulable standards through which the Committee "reconsiders" candidates for placement on the Ballot. Given the breadth of the language and absence of a compelling state interest, we cannot allow the continued operation of the reconsideration process "[w]here, as here, there are no standards governing the exercise of the discretion granted by the [reconsideration provision because] the scheme permits and encourages an arbitrary and discriminatory enforcement of the law." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 847, 31 L.Ed.2d 110 (1972). Because § 103.101(2)(c) "cannot be squared with our constitutional standards . . .," *Id.* at 171, 92 S.Ct. at 848, we hold that it is unconstitutional.[15]

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14. Although we have determined that a strict scrutiny analysis of the reconsideration process is the proper standard to apply in this case, we think that subsection (2)(c) would not pass constitutional muster under the lowest level of scrutiny.

15. It is well settled that speech regarding political beliefs and the right of association comprise the "core" of activity protected by the First Amendment. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 69, 110 S.Ct. 2729, 2734, 111 L. Ed.2d 52 (1990). Furthermore, it is abundantly clear from the record that the Committee did not reconsider Duke for placement on the Ballot because of his extensive involvement with and intimate ties to several notable white supremacist hate groups such as the Ku Klux Klan, the Nazis, and the National Association for the Advancement of White People. Therefore, we need not address the final issue on appeal because it is clear that Duke was passed over due to his speech and association with such groups.

Appendix C

CONCLUSION

Because we find that the reconsideration provisions contained in Florida Statutes § 103.101(2)(c) constitute state action which deprived the Plaintiffs' of their First and Fourteenth Amendment rights, we REVERSE the district court's order.

The Judgment is REVERSED and the matter is REMANDED for further proceedings.

APPENDIX D — DISTRICT COURT DECISION, 784 F. SUPP. 865 (S.D. FLA. 1992)

David DUKE, Patrick J. Mahoney, Larry Agran, Lyndon H. Larouche, Jr., Guillermo Sanchez, Tasharay S. Otway-Smithers, David Baldwin, Edward J. Rosenfeld, Eugene Cottrell, Claire Urdl, William Edward Bonnell and Susan Brooks Thomas, Plaintiffs,

v.

Jim SMITH, Secretary of State of the State of Florida, T.K. Wetherell, Speaker of the Florida House of Representatives, Gwen Margolis, President of the Florida Senate, James M. Lombard, Minority Leader of the Florida House of Representatives, Ander Crenshaw, Minority Leader of the Florida Senate, Simon Ferro, Chairman of the Florida Democratic Party, and Van Poole, Chairman of the Florida Republican Party, in their capacities as members of the Florida Presidential Selection Committee, Defendants.

No. 92-0134-CIV.

United States District Court,
S.D. Florida.

Jan. 30, 1992.

* * *

Bruce Rogow, Beverly Pohl, Fort Lauderdale, Fla., Nina Vanik, Miami, Fla., Richard B. Kay, Tequesta, Fla., H. Collins Forman, Fort Lauderdale, Fla., for plaintiffs.

Mark Levine, Fort Lauderdale, Fla., George Waas, Tallahassee, Fla., for defendants.

Appendix D

E. Thom Rumberger, Daniel J. Gerber, of Rumberger, Kirk & Caldwell, P.A., Orlando, Fla., for Van Poole, Crenshaw and Lombard, defendants.

MEMORANDUM OPINION AND
FINAL JUDGMENT

MORENO, District Judge.

THIS suit involved as plaintiffs a number of individuals seeking placement on the presidential preference primary ballot of the Democratic and Republican parties in the State of Florida. Another group of plaintiffs includes individuals who are political party member registered voters who would like to vote for one of the other candidate plaintiffs.

I. BACKGROUND

Plaintiffs LaRouche, Agran and Mahoney are seeking placement on the Democratic party presidential preference primary ballot. Duke seeks placement on the Republican party ballot. The Court also permitted Eugene McCarthy to intervene as a plaintiff seeking access to the Democratic ballot. Plaintiffs ask this Court to enter an injunction ordering that their names be placed on the primary ballot scheduled for March 10, 1992 and to declare the procedure set forth in Florida Statute § 103.101 as unconstitutionally void for vagueness since it provides no rules governing the decisions of the political parties and it allows for such parties and their officials to make their decisions in an arbitrary and capricious manner. Specifically, the plaintiffs allege that the Presidential Selection Committee composed of the chairman of the Democratic and Republican parties, as well as the Senate President, Speaker of the House (presumably the majority

party leaders), and the minority party leaders in each legislative house, excluded plaintiffs from their parties' ballots because of the candidates' political beliefs.

II. PROCEDURAL HISTORY

The complaint was filed on Friday, January 17,1992. The Plaintiffs seek injunctive and declaratory relief pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202 alleging violations of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution. Subsequently. the Court held a status conference and the attorneys for all parties requested from the Court an expedited trial date.

Since the presidential preference primary ballots must be printed by February 4, 1992,[1] the Court enters this Order on an emergency basis.

The plaintiffs and defendants consented, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, to a consolidation of the trial on the merits with the preliminary injunction evidentiary hearing. The Court held a trial on Tuesday, January 28, 1992.

III. TRIAL

A. Witness Testimony

Van Poole, chairman of the Florida Republican party and member of the Presidential Candidate Selection Committee, gave

1. The Florida Division of Elections must act pursuant to a federal consent decree and federal act that require absenter ballots to be mailed 35 days prior to the March 10, 1992 primary.

live testimony in this matter. Poole, Ander Crenshaw, minority leader of the Florida Senate and James Lombard, minority leader of the Florida House of Representatives, comprise the Republican party membership on the selection committee. Poole represented that Secretary of State Jim Smith's role, consistent with the statute, is merely as a nonvoting chairman who does not participate in the decisions of the Republicans or Democrats to add or delete names from the list of candidates. Democrat members of the Committee select Democrat candidates for the ballot, and Republican members select Republican candidates.

Poole testified that the three Republican members of the selection committee agreed to delete David Duke's name from the list of candidates submitted because his political views were inconsistent with traditional Republican values. Poole specifically cited Duke's former activities with the Ku Klux Klan, Nazis and his association with the National Association for the Advancement of White People. The Republican members the committee chose President George Bush and Patrick Buchanan to appear as Republican candidates on the presidential reference primary ballot.

Poole pointed out that David Duke attempted to gain access to the presidential preference primary ballot in 1988 as a Democrat. When Duke was denied access, he ran on the Populist party ballot and received 249 out of a possible 4 million votes. Given this lack of support and his absence of beliefs in Republican values, the Republican Committee members decided not to include Duke's name on the Republican ballot.

Poole acknowledged that there are no criteria set forth in the statute governing procedures for selecting candidates or reconsidering denial of access, or delineating Republican values.

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Questioned about a statement made by Secretary of State Smith concerning ambiguities in the statute, Poole explained that the Secretary was uncertain as to how to proceed in the absence of any member at selection committee meetings.

Poole testified that the State of Florida did not assist in denying Duke access since the Republican party has its own by-laws and internal operating guidelines. Poole stated that a private party has the right to associate with whomever it desires.

Poole asserted that the Selection Committee meetings did not have to occur in the Governor's conference room in the state capitol. The statute only mandates that the meetings take place on a specific day and could be located at any place including party headquarters. Poole stipulated that the state participates in the preference primary elections by facilitating elections with machines, voting cards and employees. Poole admitted that prospective candidates are not required to submit a candidacy filing fee.

Simon Ferro, chairman of the Florida Democratic Party and member of the Presidential Candidate Selection Committee, also testified at the trial. Ferro testified that the three Democrat members of the selection committee excluded Larry Agran, Lyndon Larouche, Patrick Mahoney and Eugene McCarthy from the Democrat preference primary ballot because these individuals did not meet two established criteria.

The two criteria used by the Democrat members were (1) whether the prospective candidate had qualified for federal matching funds and (2) whether the prospective candidate is generally recognized on a national level. These criteria, although not written, were developed by a straw ballot committee in accordance with the views of the Democratic National Committee.

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No candidate was deleted from the ballot on account of political beliefs. Ferro admitted that there are no standards in the statute which authorize or prescribe the unwritten, unpublished criteria used by the Democrat members to evaluate a prospective candidate's access to the ballot.

Ferro expressed his belief that the Selection Committee members were acting in their capacities as political party leaders and not as elected state officials. Ferro testified that the Florida Democratic party is a private organization operating under its own rules and procedures independent from interference by the state. The state does not restrict the right of the committee members of each political party to choose their own candidates to be placed on the preference primary ballot. Ferro maintained that the state is completely uninvolved with the selection of candidates. The Democrat members of the committee do not participate in choosing Republicans, and the Republicans are not involved in selecting Democrats.

After Ferro finished testifying, David Duke took the stand in his own behalf. Duke reiterated that he is a nationally declared Republican candidate for President of the United States who formerly held state representative office as a Republican in Louisiana. Duke stated that he was previously a conservative Democrat, but he became disenchanted with Democratic ideals and has been a Republican since 1988. Duke believes that he has gained access to the presidential preference primary ballots in at least ten states.

B. Exhibits and Affidavits

Defendant Van Poole's Exhibits, No. 1 and No. 2, are respectively the minutes of the January 7 and January 16, 1992 meetings of the Presidential Candidate Selection Committee. The

minutes from the January 7 meeting show that the Republican members of the committee did not wish to add any candidate to their list of George Bush and Pat Buchanan. The Democrats did not desire to add to their list of Jerry Brown, Bill Clinton, Tom Harkin, Bob Kerrey, Paul Tsongas and Doug Wilder. The reference to ambiguities in the statute clearly revolves around whether a meeting of the Selection Committee could occur in the absence of any member.

The January 16 minutes show that in the reconsideration hearing, the Democrats did not wish to add to the list of Democrats and the Republicans did not desire to add to their list.

Defendant Simon Ferro's Exhibit No. 1 is a questionnaire sent by Ferro to the Democratic executive committee seeking input from Democrats in compiling the list of candidates to be submitted to the Secretary of State. The questionnaire shows how many votes a prospective candidate received. The top six vote getters were placed on the list presented to the Secretary of State and transmitted to the Presidential Candidate Selection Committee.

Plaintiff David Duke's Composite Exhibit No. 1 indicates that Duke has filed his declaration of candidacy for the Presidency of the United States with the Federal Elections Commission.

Other exhibits admitted, without objection, included affidavits submitted by Gwen Margolis, President of the Florida Senate, and T.K. Wetherell, Speaker of the Florida House of Representatives, indicating that their participation in the Presidential Candidate Selection Committee was as a result of the Democratic Party Leadership roles and not in their capacities [as] legislators.

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C. Statute

Section 103.101 of the Florida Statutes provides in relevant part:

> (2) There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a nonvoting chairman; the Speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the legislature; and the chairman of each political party required to have a presidential preference primary under this section.
>
> (a) By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his name appear, or have his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same

political party as the candidate agree to delete such candidate's name from the ballot. The selection committee shall meet in Tallahassee on the first Tuesday after the first Monday in January each year a presidential preference primary is held. The selection committee shall publicly announce and submit to the Department of State no later than 5 P.M. on the following day the names of presidential candidates who shall have their names appear, or who are entitled to have their delegates' names appear, on the presidential preference primary ballot . . .

(b) Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his name on the ballot. Such request shall be made in writing to the Secretary of State no later than the second Tuesday after the first Monday in January.

(c) If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot. The Department of State shall immediately notify such candidate of the selection committee's decision.

Fla. Stat. § 103.101(2)(a), (b), (c).

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LEGAL ANALYSIS

The state action issue is the threshold question in this case. If the actions of the Presidential Candidate Selection Committee created by Florida Statute § 103.101 were actions taken "under color of state law," then this Court must address the constitutional validity of the statute. If the actions of the Committee were not taken "under color of state law," then Plaintiffs have failed to establish a cognizable claim under 42 U.S.C. § 1983, and 28 U.S.C. §§ 2201 and 2202, challenging the constitutionality of Florida Statute § 103.101.

Courts have recently outlined the various means by which private actors may engage in state action. *See Boxter v. Fulton-Dekalb Hospital Authority,* 764 F.Supp. 1510 (N.D.Ga.1991). "The proper inquiry is whether the defendant's conduct is 'fairly attributable' to the state. A person may qualify as a state actor because he receives overt assistance from state officials, acts in concert with other state actors, where his authority was delegated to him by the state, or where the state creates the legal framework governing the conduct." *Baxter v. Fulton-Dekalb Hospital Authority,* 764 F.Supp. 1510, 1517 (N.D.Ga.1991).

A long line of precedent stands for the proposition that political parties have the right to determine and enforce the qualifications of members and candidates through self-governance. In *Ripon Society v. National Republican Party,* 525 F.2d 567 (D.C.Cir.1975) the Court of Appeals stated "that a party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interest, deserves the protection of the Constitution. . . . The express Constitutional rights of speech and assembly are of slight value indeed if they do not carry with them a concomitant right of political association." *Id.* at 585.

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In essence, political parties have no fewer rights than other private organizations. The Constitution and Bill of Rights serves to protect these organizations from unwarranted government intrusion and interference. The elected leadership of the Republican and Democratic parties have exercised their First Amendment right not to associate with the Plaintiffs seeking to be placed on the Florida Primary ballot. "A State, or a court, may not constitutionally substitute its own judgment for that of the Party. . . . And as is true of all expressions of First Amendment freedoms, the court may not interfere on the ground that they view a particular expression as unwise or irrational." *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 123-24, 101 S.Ct. 1010, 1020, 67 L.Ed.2d 82 (1981).

In *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), the United States Supreme Court held a statute unconstitutional on First Amendment grounds because it restricted political parties rights of association. The Republican Party of Connecticut wanted to allow voters to participate in its primaries even though they had only recently registered as Republicans. The state prohibited participation of such registrants on the grounds that the state wanted to ensure competent administration of the primary, prevent voter confusion, and protect the integrity of the two-party system. The Supreme Court decided that such interests were greatly outweighed by the political party's right to associate with those of its own choosing. The court stated that "The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224, 107 S.Ct. at 554.

In *Wymbs v. Republican State Committee of Florida,* 719 F.2d 1072 (11th Cir. 1983), *cert. den.* 465 U.S. 1103, 104 S.Ct. 1600, 80

L.Ed.2d 131 (1984), the Eleventh Circuit Court of Appeals upheld a political party's right to choose the method by which it would select delegates to the party's national convention. In *Wymbs* the Court followed the Supreme Court's admonition that courts and the state should not interfere in the internal operations of political parties. *Id.* at 1084. Despite plaintiff's allegations that the party's delegate selection process violated the right to equal representation and equal participation, the Court sustained the political party's right to govern itself free from government intrusion.

A. Plaintiffs Have Failed to Prove State Action

In order to prove a right to relief for the alleged constitutional violations, the Plaintiffs must prove state action. *Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). It is clear upon a review of Fla.Stat. §§ 103.091, 103.101, *Kay, v. Smith,* TCA 88-40009-MMP (consolidated vith Nos. 88-40015 and 40016) (N.D.Fla. 1988) *Aff'd unthout opinion,* 897 F.2d 536 (11th Cir.1990) (unpublished), and the evidence presented at the trial that the Secretary of State's role is of a ministerial nature and that the choice of presidential candidates is purely a political and party function.

The fact that the Florida Statutes mandate the existence of a Presidential Candidate Selection Committee, currently comprised of three Republican leaders, three Democratic leaders and the Secretary of State, does not transform the actual operation of that Committee from internal party proceedings to state action. The evidence before this Court suggests that, at best, the meeting of the Presidential Candidate Selection Committee provides a definite meeting time for decision for political parties to transmit the names

of their presidential preference primary candidates to the Secretary of State.

With specific regard to the Secretary of State, that officer is chosen to serve on the selection committee as the chief election officer of the state, § 97.012, Fla.Stat., although that officer does not conduct elections. The Secretary of State's role is that of a facilitator who does not and cannot take any action. It should also be pointed out that under Fla.Stat. § 103.101(2), while the Secretary of State is designated as chairman of the Presidential Candidate Selection Committee, he is a non-voting chairman, which is further evidence of the absence of state action.

By operation, the real decision to include or exclude a candidate on the presidential preference primary ballot is made by the political party's leadership. As previously discussed at length, the internal rules and policies of a political party which lead to the decision to disallow a candidate to appear on the presidential primary ballot are clearly protected by the Constitution. Allowing Plaintiffs any opportunity to interfere with the internal functions and decisions of the political parties would be a violation of the parties own rights of association.

B. Plaintiffs' Constitutional Rights Have Not Been Violated

Plaintiffs' reliance on numerous cases involving issues of ballot access in general elections is misplaced. Different interests are implicated in the context of a primary election, and those differing interests require a different result when the issue is access to ballot in a primary election.

Numerous courts have recognized the fundamental

differences between primary elections, in which the parties select their candidates, and general elections, in which the people choose their representatives. *See e.g., Belluso v. Poythress,* 485 F.Supp. 904 (N.D.Ga.1980); *Cross v. Fong Eu,* 430 F.Supp. 1036 (N.D.Cal.1977); *Nader v. Schaffer,* 417 F.Supp. 837 (D.Conn.1976), *aff'd mem.,* 429 U.S. 989, 97 S.Ct. 516, 50 L.Ed.2d 602 (1976).

While the voters' right to vote may be paramount in the context of a general election, denying an individual the opportunity to vote for a candidate in a primary election does not infringe on the voter's right of freedom of association. *Rosario v. Rockefeller,* 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973). However, the political parties' own rights of association would be infringed upon by Plaintiffs' intended interference into the parties candidate selection processes. *See Nader, supra,* at 846-47.

There is no fundamental right to run for public office. *Bullock v. Carter,* 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972); *see also, e.g., Adams v. Askew,* 511 F.2d 700 (5th Cir.1975). Nor is there any constitutional right to primary participation. *Consumer Party v. Davis,* 633 F.Supp. 877, 888 (E.D.Pa.1986); *see also, American Party of Texas v. White,* 415 U.S. 767, 781, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974).

Furthermore, there are no allegations which suggest that Plaintiff Duke or any co-plaintiff is a member of a suspect class protected by the Equal Protection Clause. *See San Antonio School Dist. v. Rodriguez,* 411 U.S. 1, 28, 93 S.Ct. 1278,1293, 36 L.Ed.2d 16 (1973). In the absence of the implication of a fundamental right or of a suspect classification, which is clearly not involved here, an action is measured by the criterion of mere rationality. *See, e.g., Belluso v. Poythress,* 485 F.Supp. 904, 910 (N.D.Ga.1980); *Joseph*

v. City of Birmingham, 510 F.Supp. 1319, 1328 (E.D.Mich. 1981). Political parties' interests in limiting the size of the ballot to minimize voter confusion and to preserve the integrity of the process have passed constitutional muster. *Consumer Party v. Davis,* 633 F.Supp. at 887; *American Party of Texas v. White,* 415 U.S. at 782 n. 14, 94 S.Ct. at 1307 n. 14. Therefore, Plaintiffs' rights to equal protection of the law have not been violated by Defendants' actions.

Furthermore, Plaintiffs' First Amendment rights are not violated as Plaintiffs have cited no law which prevents them from organizing or campaigning outside the parameters of the Republican or Democratic Party Primary and any candidate's absence from the primary ballot in no way prevents access to the general ballot. *Duke v. Cleland,* 783 F.Supp. 600, 602 *aff'd* 954 F.2d 1526 (11th Cir.1992).

The state of Florida provides an independent candidacy route as an "alternative to being nominated in one of the direct party primaries." *Storer v. Brown,* 415 U.S. 724, 733, 94 S.Ct. 1274, 1280, 39 L.Ed.2d 714 (1974). Plaintiffs simply can register as "independent candidates for office," pursuant to § 99.0955, Florida Statutes. Alternatively, Plaintiffs can register as "minor party candidates," pursuant to § 99.096. Under these sections, candidates for office may have their names printed on the general ballot by complying with certain minimum standards, the most substantial of which is to obtain the signatures of three percent of the registered electors in the state.

These sections provide a constitutionally permissible alternative to the Plaintiffs' participation in the Democratic or Republican presidential preference primary. *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Given these

reasonable avenues to appear on the general ballot,[2] Plaintiffs can allege no violation of constitutional rights due to any exclusion from the Democratic or Republican presidential reference primary ballot. A person simply does not have a constitutionally protected right to run as the representative of his current chosen political party. *Belluso v. Poythress,* 485 F.Supp. 904, 912 (N.D.Ga.1980).

To force a political party to accept as its standard bearer an individual whose views are not shared by the same party not only violates the party's constitutional freedom of association but would run contrary to the very reason for the existence of a political party, i.e., to advance, without state interference, whatever political views it desires, and to choose whomever it considers to be a viable leader of that party.

Based on the foregoing, it is

ADJUDGED that Final Judgment is ENTERED in Favor of Defendants.

DONE AND ORDERED.

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2. Plaintiff Duke is well aware of these alternative avenues. After being excluded from the Democratic primary ballot in 1988, Duke availed himself of a reasonable alternative avenue by running as a member of the Populist party.

APPENDIX E — FLORIDA STATUTES, § 103.101

§ 103.101, **Fla. Stat., Presidential preference primary** provides in pertinent part:

> (2) There shall be a Presidential Candidate Selection Committee composed of the Secretary of State, who shall be a nonvoting chairman; the Speaker of the House of Representatives; the President of the Senate; the minority leader of each house of the Legislature; and the chairman of each political party required to have a presidential preference primary under this section.
>
> (a) By December 31 of the year preceding the Florida presidential preference primary, each political party shall submit to the Secretary of State a list of its presidential candidates to be placed on the presidential preference primary ballot or candidates entitled to have delegates appear on the presidential preference primary ballot. The Secretary of State shall prepare and publish a list of the names of the presidential candidates submitted. The Secretary of State shall submit such list of names of presidential candidates to the selection committee on the first Tuesday after the first Monday in January each year a presidential preference primary election is held. Each person designated as a presidential candidate shall have his name appear, or have his delegates' names appear, on the presidential preference primary ballot unless all committee members of the same political

party as the candidate agree to delete such candidate's name from the ballot. The selection committee shall meet in Tallahassee on the first Tuesday after the first Monday in January each year a presidential preference primary is held. The selection committee shall publicly announce and submit to the Department of State no later than 5 p.m. on the following day the names of presidential candidates who shall have their names appear, or who are entitled to have their delegates' names appear, on the presidential preference primary ballot. The Department of State shall immediately notify each presidential candidate designated by the committee. Such notification shall be in writing, by registered mail, with return receipt requested.

(b) Any presidential candidate whose name does not appear on the list submitted to the Secretary of State may request that the selection committee place his name on the ballot. Such request shall be made in writing to the Secretary of State no later than the second Tuesday after the first Monday in January.

(c) If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the

candidate's name on the ballot. The Department of State shall immediately notify such candidate of the selection committee's decision.

Supreme Court, U.S.
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CASE NO. 94-21

IN THE

Supreme Court of the United States

October Term, 1994

DAVID DUKE, *et al.*

Petitioners,

vs.

JIM SMITH,
Secretary of the State of Florida, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Does *Farrar v. Hobby,* 113 S.Ct. 566 (1992), entitle petitioners to an award of attorneys' fees as prevailing parties under 42 U.S.C. § 1988 where, under a presidential preference primary ballot access statutory scheme involving an initial consideration process and a separate reconsideration procedure, a court of appeals invalidates only the latter, leaving intact the First Amendment rights of political parties to determine initially who shall be on their respective ballots, thereby precluding any alteration of the litigants' legal relationship, requiring no modification of respondents' behavior, and imposing no obligation on respondents to do anything to or for petitioners?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that petitioners, in their effort to demonstrate entitlement to an award of attorneys' fees as prevailing parties under 42 U.S.C. § 1988, fundamentally misperceive fact and law while raising a non-issue strawman in the "capable of repetition, yet evading review" standard which has no relevance to the Eleventh Circuit's denial of attorneys' fees.

Contrary to petitioners' assertions and as clearly demonstrated by a reading of the Eleventh Circuit's attorneys' fees decision, Pet. App. A, pgs. 1a-4a, and the Court's decision on the merits, 13 F.3d 388 —

1. Petitioners were not unconstitutionally denied ballot access.

2. The Eleventh Circuit found no constitutional impediment in the initial ballot access procedure or decisions made under § 103.101(2)(a).

3. Petitioners could not have obtained injunctive relief entitling them to ballot access.

4. Respondents do not need to alter their behavior in any way as a result of the Eleventh Circuit's decision.

5. Respondents, or their successors, may again exclude David Duke from the ballot in the future in the same manner as before — through the First Amendment-protected initial ballot consideration process.

6. *Farrar* applies to declaratory and injunctive actions, in addition to damages claims.

Section 103.101, Fla. Stat., provides for two ballot access opportunities for presidential candidates to be placed on Florida's presidential preference primary ballot. Under subsection (2)(a)'s initial consideration procedure, each political party submits to the Florida Secretary of State a list of its presidential candidates for ballot placement. The Secretary of State prepares, publishes, and submits a list of these names to the Presidential Candidate Selection Committee. Those names appear on the ballot unless all committee members of the same political party as any listed candidate agree to delete a candidate's name from the ballot. In short, the Republican committee members are responsible for the Republican Party candidates, and the Democratic committee members are responsible for their party's candidates.

By subsection (2)(c), a disappointed presidential candidate may request this same committee to reconsider placing that person's name on the ballot. Only this second ballot access provision was addressed by the Eleventh Circuit; after the district court denied petitioners' declaratory and injunctive relief as to both statutory procedures, petitioners abandoned any claim as to the initial consideration procedure (and committee decisions based thereon) and argued only as to the reconsideration process.

The Eleventh Circuit's attorneys' fees denial decision carefully follows this Court's instructions in *Farrar v. Hobby*. Thus, there is no decisional conflict, and there is no question of first impression, as the "capable of repetition, yet evading review" claim is of no relevance to, and has no bearing on, that Court's disposition of petitioners' attorneys' fees effort.

STATEMENT OF THE CASE

Petitioners sought to have their names placed on the 1992 Florida presidential preference primary ballot. They submitted their names to the Presidential Candidate Selection Committee made up of respondents Jim Smith, Florida Secretary of State; T.K. Wetherell, Speaker of the Florida House of Representatives; and Gwen Margolis, President of the Florida Senate, as well as House Minority Leader James M. Lombard, Senate Minority Leader Ander Crenshaw, and Florida Democratic Party Chairman Simon Ferro and Florida Republican Party Chairman Van Poole. In accordance with § 103.101(2)(a), representatives of the two major political parties gave lists of their respective candidates for ballot placement to Secretary of State Smith. None of the petitioner candidates was on either list submitted by the parties to the Secretary of State.

Subsequently, disappointed candidates requested the Secretary of State pursuant to subsection 2(c) to have their names reconsidered for inclusion on the ballot by the committee, which reconsideration was rejected. Petitioners then filed suit seeking a declaration that § 103.101 was unconstitutional, and an injunction requiring the Secretary of State to place their names on the 1992 Florida presidential primary party ballots. This relief was denied by the district court. On appeal, petitioners voluntarily restructured their case by limiting their constitutional challenge only to the reconsideration provision. Pet. App. A, pg. 3a.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit Court Of Appeals' Decision Rejecting Petitioners' Unsubstantiated Factual Allegations and Denying Their Request for Attorneys' Fees, is Wholly Consistent With *Farrar v. Hobby,* 113 S.Ct. 566 (1992) and Its Predecessors. As a Result of the Appellate Court's Decision on the Merits Invalidating Only the Presidential Preference Primary Ballot Access Reconsideration Provision and Leaving Intact the Initial Consideration Process, 13 F.3d 388 (11th Cir. 1994), Respondents Are Not Required to Alter the Legal Relationship Between the Parties, There is no Modification Whatever of Respondents' Behavior In a Way that Directly Benefits Petitioners, and Respondents Are Under No Obligation to do Anything to Accommodate Petitioners. Petitioners' "Capable of Repetition, Yet Evading Review" Argument Has no Relevance Whatever to the Eleventh Circuit's Application of *Farrar* to the Facts Here. Accordingly, the Eleventh Circuit's Decision is in Complete And Faithful Harmony With *Farrar's* Prevailing Party Standard.

Petitioners' claims of the existence of an "important unanswered question" (Pet. pg. 7) and conflict between the Eleventh Circuit's attorneys' fees decision and *Farrar v. Hobby,* ring hollow in light of the facts of this case, the particular ballot access law in question and the Eleventh Circuit's rejection of petitioners' putative factual recitations in faithfully adhering to *Farrar's* principles. In fact, the Eleventh Circuit noted that petitioners offered no substantiation for their claims (see Pet. App. A, pg. 4a regarding their unsupported claim that respondents must change

their behavior). Rather than attempt to justify their factual allegations now raised for a second time by their petition, petitioners continue to make the same unsubstantiated representations rejected by the Eleventh Circuit. As demonstrated by the Eleventh Circuit and the points set out herein, there is neither an "important unanswered question," nor is there decisional conflict. This case involves only the faithful application of the particularized facts and ballot access law here to the prevailing party standard espoused in *Farrar.*

At the outset, petitioners' attempt to create an "important unanswered question" by invoking the "capable of repetition, yet evading review" exception to mootness constitutes nothing more than a strawman masking a simple, straightforward application of the principles espoused by this Court in *Farrar v. Hobby* to the specific facts of the instant litigation. One searches in vain for any reference to, or intimation of, the application of this exception in the Eleventh Circuit's decision. Indeed, there is no such discussion precisely because it has nothing to do with the Court's application of *Farrar* to the case *sub judice.*

As the Eleventh Circuit points out, petitioners sought a declaratory judgment that § 103.101 was unconstitutional, and an injunction requiring placement of their names on the 1992 Florida presidential primary ballot. The district court denied that relief and, on appeal, petitioners argued only that the reconsideration process was unconstitutional. *Duke v. Smith,* 13 F.3d at 392. Thus, the Eleventh Circuit's holding of unconstitutionality affects only the reconsideration process and not the entire primary ballot system.

The *sine qua non* of prevailing party status supporting an award of attorneys' fees under 42 U.S.C. § 1988 is "relief (to a plaintiff) on the merits of his claim (which) *materially alters the legal relationship* between the parties by *modifying*

the defendant's behavior in a way that *directly benefits* the plaintiff." *Farrar,* 113 S.Ct. at 573. (Emphasis added.)

Farrar's holding is born of this Court's analysis of *Hewett v. Helms,* 482 U.S. 755 (1987); *Rhodes v. Stewart,* 488 U.S. 1 (1988); and *Texas State Teachers Ass'n v. Garland Independent School District,* 489 U.S. 782 (1989). *Farrar* thus represents a synthesizing of these earlier decisions. See 113 S.Ct. at 572. Under this distilled analysis, for petitioners to be prevailing parties, they must show that, as reflected by the Eleventh Circuit (Pet. App. A, pg. 3a), "'[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.' 113 S.Ct. at 573." Technical, pyrrhic victories, or "the moral satisfaction (that) results from any favorable statement of the law" cannot bestow prevailing party status. 113 S.Ct. at 573-74.

In rejecting petitioners' claims of entitlement to attorneys' fees based solely on the invalidation of the only provision before the Eleventh Circuit — the statutory reconsideration process — the Court said:

> Although we struck down the reconsideration process, the appellant did not challenge the method by which the list of primary candidates is determined as an initial matter. In our opinion, we suggested that the initial determination process, embodied in Section 103.101(2)(a) was constitutional because "the autonomous political parties' First Amendment rights take their motivation for exclusion (or inclusion) [of potential candidates] outside the ambit of state action." *Duke,* 13 F.3d at 391 n.3. *It is through that initial determination process, which the defendants did not challenge and which we left intact, that the appellants were excluded from the 1992 primary ballot, and through which they can be excluded from any*

> *future primary ballot.* Indeed, as the appellees point out, the appellants originally had two opportunities for ballot access—the initial selection process and the reconsideration process; they have "succeeded" in eliminating one of them, effectively halving their number of opportunities for getting on the Florida primary ballot. (Pet. App. A, pgs. 3a and 3b.) (Emphasis added.)

Thus, petitioners' status as it existed before the Eleventh Circuit's decision on the merits remains unchanged, as does the status of the respondents. In short, petitioners remain not entitled to ballot placement and respondents need to do nothing further in that there is nothing further for them to do. In sum, petitioners enjoy no further entitlement or benefit than they had at the inception of the litigation, and respondents are required to do nothing further in this cause; their status is precisely what it was at the beginning of this litigation. Petitioners do not get ballot access, a declaration of entitlement to ballot access or damages. Respondents are not required to pay damages, apologize, or do anything for petitioners' benefit.

Because petitioners are in no different posture now than they were when they were initially denied ballot placement, and respondents are in no different posture now with respect to ballot placement than they were at the beginning of the litigation, petitioners are not prevailing parties because they received no direct benefit from the Eleventh Circuit's decision, and respondents are under no obligation to modify their behavior as a result of the appellate court's action.

Nevertheless, in an effort to craft decisional conflict and an issue of first impression, petitioners misperceive several facts.

First, contrary to petitioners' assertion, candidates were not unconstitutionally denied ballot access, and petitioner

Duke did not obtain a "finding that his exclusion from the ballot violated the First Amendment." (Pet. pg. 10). Only the reconsideration process was at issue; the Eleventh Circuit specifically determined that the initial ballot access determinations, unchallenged and left intact, provided for exclusion from the 1992 ballot, and may be relied on to exclude these same candidates "from any future primary ballot." Pet. App. A, pg. 3b.

Second, petitioners erroneously maintain that the Eleventh Circuit did not rule on the constitutionality of the initial ballot access provision. In *Duke v. Smith,* 13 F.3d 388, 391, fn.3 (11th Cir. 1994), the Court specifically said:

> We will not consider the procedure that the respective political parties employed in determining which candidates to submit under subsection (2)(a) *because at that stage of the process, the autonomous political parties' First Amendment rights take their motivation for exclusion (or inclusion) outside the ambit of state control.* See, e.g., *Democratic Party v. Wisconsin,* 450 U.S. 107, 123-24, 101 S.Ct. 1010, 1019-20, 67 L.Ed.2d 82 (1981); *Kuspar v. Pontikes,* 414 U.S. 51, 56-57, 94 S.Ct. 303, 307-08, 38 L.Ed.2d 260 (1973). (Emphasis supplied.)

Indeed, in its attorneys' fees decision, the Eleventh Circuit reiterates its view as to the constitutionality of the initial consideration process. Pet. App. A, pg. 3a. This clearly demonstrates that the Court recognized that the initial ballot access consideration process is a matter protected by the political parties' First Amendment rights.

Third, petitioners incorrectly aver that they could have obtained an injunction placing candidates on the ballot. Pet. pg. 10. This is not so; the Court specifically noted that the initial consideration process remains intact, and

petitioners were legally precluded from ballot access based on this provision. Pet. App. A, pg. 4a. Moreover, as the Eleventh Circuit noted, "the appellants (petitioners) originally had two opportunities for ballot access — the initial selection process and the reconsideration process; they have 'succeeded' in eliminating one of them, effectively halving their number of opportunities for getting on the Florida primary ballot." Pet. App. A, pg. 4a. Hence, petitioners had no injunctive remedy at any time.

Fourth, petitioners mistakenly represent that the respondents must change their behavior as a result of the Eleventh Circuit's decision. That simply is not the case. While the Eleventh Circuit reflected that "the appellants (petitioners) could seek to hold the appellees (respondents) in contempt were they to apply the reconsideration process...in the future(,)" this is not the kind of behavioral change required by *Farrar* in order for a plaintiff to be deemed a "prevailing party" and thereby entitled to an award of attorneys' fees. Pet. App. A, pg. 3a. The Eleventh Circuit specifically rejected petitioners' "change of behavior" argument as follows:

> The appellants argue that as a result of our ruling, "[t]he State will have to change its statute, or the Defendants will have to give relief to all candidates seeking reconsideration from Presidential Preference Primary ballot exclusion." Not so. *The appellants point to no case or constitutional principle that obligates the Florida legislature to provide an appeals process for disgruntled presidential candidates.* As a result of our holding, *there will be no means for disappointed candidates to appeal their omission from the primary ballot, unless and until the Florida legislature of its own free will decides to enact a new reconsideration mechanism. Nothing in the decision* which the appellants obtained from this Court *obliges* Florida

> to adopt a new reconsideration procedure of any type in place of the unconstitutional procedure that we struck down. (Pet. App. A, pg. 4a.) (Emphasis added.)

Against this backdrop, petitioners' criticism of the "Eleventh Circuit's speculation about how the state may choose to correct its deficient procedures" (Pet. pg. 13) exemplifies sophistry and rings a hollow note. There is absolutely no basis for petitioners' change-of-behavior claim here.

Fifth, petitioner Duke's cavalier statement that he "may not again" be excluded from the ballot is flatly contradicted by the Eleventh Circuit's leaving intact the political parties' First Amendment right to choose its candidates through the initial ballot placement process as described above.

And sixth, petitioners are in error when they intimate *Farrar* is limited to damages claims only. As this Court specifically said in *Farrar,* discussing the definition of prevailing party and citing to *Rhodes v. Stewart, supra,*

> We reaffirmed that a judgment — *declaratory or otherwise* — "will constitute relief, for purposes of 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff.

113 S. Ct. at 572. (Emphasis added.)

This Court thus clearly contemplated declaratory and injunctive relief in crafting the prevailing party test. To contend otherwise simply misreads *Farrar.*

The above analysis demonstrates that each of petitioners' substantive claims are refuted by the record and/or rejected by the Eleventh Circuit.

Farrar is not limited to damage actions only; petitioners would not have been entitled to injunctive relief for ballot access in 1992, and they similarly will not be so entitled in

1996; respondents need not change their behavior in any way; and petitioners were not unconstitutionally denied ballot access.

As the Eleventh Circuit said regarding petitioners' "success" in invalidating the reconsideration process and thus halving their ballot access opportunities:

> [T]he appellants' victory is a technical one devoid of practical benefit to them. As a result of their efforts and our decision, the appellants have attained nothing more than " 'the moral satisfaction [that] results from any favorable statement of law,' " *Farrar,* 113 S.Ct. at 573-574 (quoting *Hewitt v. Helms,* 482 U.S. 755, 762, 107 S.Ct. 2672, 2676 (1987)); such satisfaction "cannot bestow prevailing party status." *Id.* at 574. (Pet. App. A, pg. 4a.)

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 94-21

In The

Supreme Court of the United States

October Term, 1994

DAVID DUKE, *et al.*,

Petitioners,

vs.

JIM SMITH, Secretary of the State of Florida, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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ARGUMENT

I.

THE RESPONDENTS' "NO BENEFIT" THEORY HAS NO MERIT.

The Florida Presidential Preference Primary statute "is the exclusive vehicle through which a person may gain access to the Florida presidential preference primary ballot" (Pet. App. C-10a). It was a two-stage process. The first stage required a decision by the political parties represented on the Presidential Candidate Selection Committee regarding who would appear on the ballot. § 103.101(2)(a). The second stage was the statutory reconsideration process accorded an excluded candidate:

> If a presidential candidate makes a request that the selection committee reconsider placing the candidate's name on the ballot, the selection committee will reconvene no later than the second Thursday after the first Monday in January to reconsider placing the candidate's name on the ballot.

Section 103.101(2)(c). The court below concluded this section constituted state action, that it lacked "any articulable standards," permitted and encouraged "arbitrary and discriminatory enforcement of the law," and that David Duke "was passed over due to his speech and association" in violation of the First Amendment. (Pet. App. C-22a). The district court's decision was "REVERSED and the matter . . . REMANDED for further proceedings." *Id.* (emphasis in original).

The thrust of the Brief in Opposition is that since Duke and the other excluded candidates only won their reconsideration

argument they won nothing, because the initial stage party rejection still stood, and the Respondents have no obligation to do anything.[1]

If accepted, that cynical view means arbitrary, discriminatory, anti-First Amendment state action within the state's electoral process need not be corrected. It would mean the state can do nothing, despite its patently invalid statutory process. It also would mean that the federal court cannot provide a remedy because, according to the Respondents, the candidates were already declared *persona non grata*. It also would mean that the Court of Appeals decision was meaningless.

None of those results can be reconciled with the Florida statute, the Constitution, or federal court jurisdiction. Since § 103.101 guarantees a two-stage process, the unconstitutional second stage must be deleted or amended. Since the Constitution condemns arbitrary, discriminatory, anti-First Amendment state action, those injured by such conduct are entitled to a federal court remedy. Since the injury was capable of repetition yet evading review, the controversy continued to be cognizable under article

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1. Here is the key paragraph of the Brief in Opposition summing up the Respondents' theory:

> Because petitioners are in no different posture now than they were when they were initially denied ballot placement, and respondents are in no different posture now with respect to ballot placement than they were at the beginning of the litigation, petitioners are not prevailing parties because they received no direct benefit from the Eleventh Circuit's decision, and respondents are under no obligation to modify their behavior as a result of the appellate court's action.

Brief in Opposition, p.7.

III, § 2, United States Constitution. Since the decision below was reversed and remanded for further proceedings, the Petitioners prevailed and are entitled to fees under 42 U.S.C. § 1988.

The only basis for saying that the Petitioners did not directly benefit is the undisputed fact that the election is over. That fact places this case squarely within the framework the Petitioners have presented: since a prevailing plaintiff will never "directly benefit" when justiciability is achieved *via* the capable of repetition yet evading review doctrine, does that mean a prevailing plaintiff will always be denied attorneys fees because his or her victory comes too late?

II.

FOR PLAINTIFFS WHOSE CLAIMS SURVIVE UNDER A JUDICIALLY-CREATED EXCEPTION TO MOOTNESS, THE PURPOSE OF 42 U.S.C. § 1988 REQUIRES AN EXCEPTION TO THE "DIRECT BENEFIT" REQUIREMENT FOR AN AWARD OF ATTORNEYS FEES.

The Petition presents the important, unresolved question of whether the *Farrar v. Hobby,* 113 S. Ct. 566 (1992), "direct benefit" test applies to "capable of repetition yet evading review" plaintiffs whose direct benefits were denied because of an erroneous district court decision. (Petition, pp. 8-9, *citing Farrar v. Hobby,* 113 S. Ct. at 573). Here, the Court of Appeals reversed the district court, awarded prevailing party statutory costs, but refused Title 42 U.S.C. § 1988 statutory fees because the election which triggered the plaintiffs constitutional inquiry had passed.

The "capable of repetition yet evading review" doctrine kept the case justiciable, recognizing that important electoral constitutional rights could repeatedly be lost to unconstitutional state action if that exception to mootness were not activated. The

civil rights attorneys fee statute, Title 42 U.S.C. § 1988, encourages citizens to vindicate their constitutional rights by assuring them reasonable attorneys fees if they prevail. The decision below creates this anomaly: the protection of constitutional guarantees was important enough to preserve article III, § 2 justiciability despite the passage of the election, but the passage of the election was a sufficient reason to conclude that the Plaintiffs' victory was only pyrrhic, and thus not statutorily compensable under *Farrar v. Hobby*.

We respectfully submit that the Respondents' dismissal of "capable of repetition yet evading review" as a "non-issue strawman" (Brief in Opposition, pp. 1, 5) disregards the centrality of that concept. *But for* capable of repetition there would have been no appellate decision invalidating Florida's Presidential Preference Primary election procedures and reversing the district court. Had the district court ruled correctly, and the Court of Appeals affirmed, there would be no doubt about Plaintiffs' prevailing party status for § 1988 purposes.[2] The Respondents' construct would mean that *Farrar v. Hobby* will result in denials of § 1988 attorneys fees to all prevailing parties whose constitutional cases are decided under the aegis of capable of repetition yet evading review. Neither *Farrar v. Hobby* nor 42 U.S.C. § 1988 contemplated that rote rejection of Congress' mandate to encourage the protection of constitutional rights.

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2. A plaintiff who seeks, and obtains, a declaratory judgment of unconstitutionality has prevailed on a significant issue, *whether or not* injunctive relief is granted. *See* Petition at 9, *citing Farrar*, 113 S. Ct. at 572 (" 'plaintiffs may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit' ") (citation omitted). *See infra* at p. 5.

III.

THE DECLARATORY JUDGMENT MAKES PETITIONERS PREVAILING PARTIES FOR § 1988 FEE PURPOSES.

The Respondents' remarkable statement that "Petitioners were not unconstitutionally denied ballot access" (Brief in Opposition, p. 1) is impossible to square with the Eleventh Circuit's unequivocal holding that an integral part of the State of Florida's ballot access statute " 'cannot be squared with our constitutional standards . . . [and] is unconstitutional.' " (Pet. App. C-22a, *quoting Papachristou v. City of Jacksonville*, 405 U.S. at 171). The court below found "state action which deprived the Plaintiffs' of their First and Fourteenth Amendment rights . . . ." (Pet. App. C-23a).

Respondents posit that despite the Eleventh Circuit's unambiguous declaration that § 103.101(2)(c) is unconstitutional, ballot access *injunctive relief* would not necessarily have been available, had appellate review been completed prior to the election. We find it hard to reconcile the appellate declaratory judgment with the notion that Petitioners would not have *ipso facto* been entitled to the corresponding injunctive relief they sought, had the declaratory judgment been obtained prior to the election. It seems elementary that if the State's impediment to a candidate's ballot access ("a bipartisan committee to serve as the final gate through which all candidates must flow before securing a place on the ballot" Pet. App. C-18a) is unconstitutional, the remedy is to open the gate. However, that question was not briefed or resolved below because the issue of injunctive relief was moot during the period of appellate review.[3]

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3. The post-judgment statement by the Eleventh Circuit panel, in its Order denying fees, that "even if the primary were approaching instead of receding, our decision in *Duke v. Smith* would not benefit the appellants," is patently speculative, since the remedy issue was never before that court.

Ballot access to the Florida primary ballot was governed exclusively by § 103.101, Fla. Stat., which provided, *inter alia*, for two meetings of the Presidential Candidate Selection Committee. Respondents view this as "two ballot access opportunities." (Brief in Opposition, p. 2). Ballot access was *not* available through two independent routes. There was but *one* cohesive two-stage ballot access statute, with which Petitioners fully complied.[4] (Pet. App. C-11a, 12a n. 4).

Since the § 103.101(2)*(c)* procedure for the second Committee meeting has been declared unconstitutional (Pet. App. C-22a), the fact that the § 103.101(2)*(a)* procedure for the first meeting may not be unconstitutional does not "save" the State's statutory scheme. There must be some change in it, because section (c) is invalid. Petitioners' entitlement to attorneys fees for prevailing in their constitutional challenge to the statute must be measured by their constitutional success. The capable of repetition yet evading review doctrine which preserved justiciability and led to the declaratory relief requested (Pet. App. C, 14a n. 7) should not shield the Respondents. If the claim was important enough to survive and the state action was egregious enough to be invalidated, § 1988's encouragement of private suits to protect civil rights should make *Farrar v. Hobby's* "direct benefit" incantation inapplicable to this case.

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4. The Eleventh Circuit referred to the first meeting of the Presidential Candidate Selection Committee as one "stage of the process," not as one of two ways to gain ballot access. (Pet. App. C-12a n. 3).

CONCLUSION

For the foregoing reasons and those contained in the Petition for Writ of Certiorari, this Court should grant review of the Order of the Eleventh Circuit Court of Appeals denying § 1988 attorneys fees in this case.

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